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JUL 6 1949
CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

October Term, 1948.

No. 167

PAUL J. ZIEGLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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IN THE

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October Term, 1948.

No.....

PAUL J. ZIEGLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice, and to the Associate Justices, of the Supreme Court of the United States:

Petitioner, PAUL J. ZIEGLER, respectfully prays the grant of a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit entered March 18, 1949, and as amended on June 9, 1949, in the above-entitled action. The Transcript of Record is supplied herewith.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code Annotated. (Act of June 25, 1948, C. 646, 62 Stat. 869.) The matter to be reviewed arises under General Ration Order No. 8 (8 F. R. 3783) and Third Revised Ration Order

No. 3 (11 F. R. 134) of the sugar rationing orders promulgated pursuant to the Second War Powers Act of 1942, 52 Stat. 177, *et seq.*, 50 U. S. C. A. App. Sec. 633, *et seq.* These orders are set forth in the Appendix.

Summary Statement.

The Petitioner was convicted after trial before a jury in the United States District Court for the Southern District of California on February 18, 1947, on all counts of an Information in eight counts filed in said District Court, charging him with four violations of Section 15.7(d) of Third Revised Ration Order No. 3 (Counts ONE, THREE, FIVE and SEVEN) and four violations of Section 2.9 of General Ration Order No. 8 (Counts Two, FOUR, SIX and EIGHT), both of which ration orders were issued pursuant to authority granted the President by Congress in the Second War Powers Act of 1942, Section 301, 52 Stat. 177, 50 U. S. C. A. App., Section 633 [R. 2-8]. The West Coast Supply Company, a partnership consisting of Petitioner's father and two brothers, doing business in Los Angeles, California, as wholesalers of jams, jellies and allied products, was made a co-defendant with Petitioner in the Information.

The West Coast Supply Company maintained three separate sugar ration bank accounts in the Union Bank & Trust Company, Los Angeles, California. One account was called a wholesale account; another, a processing account; and a third, an industrial account [R. 64].

Count ONE of the Information charged that the Petitioner and the West Coast Supply Company did wilfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks

drawn on that account. Counts THREE, FIVE and SEVEN are similar to Count ONE except that each of these counts alleges a different sugar ration check. Counts TWO, FOUR, SIX and EIGHT charge that the Petitioner and the West Coast Supply Company did wilfully and unlawfully receive a rationed commodity, namely sugar, in exchange for a sugar ration check drawn by Petitioner on the account of the West Coast Supply Company when both Petitioner and the West Coast Supply Company knew that the ration document was not validly issued because the West Coast Supply Company did not have a balance in its account sufficient to cover the check.

All the checks are alleged to have been issued on or about July 1, 1946, in Los Angeles County, California, and all sugar is alleged to have been received during a period from on or about July 3, 1946, to on or about August 17, 1946. The sugar allegedly received by the Petitioner and the West Coast Supply Company, as charged in the even-numbered counts, is charged to be the sugar obtained by means of the alleged illegally issued ration checks referred to in the odd-numbered counts. The odd-numbered counts purport to allege violations of Third Revised Ration Order No. 3, Section 15.7(d), and even-numbered counts purport to allege violations of General Ration Order No. 8, Section 2.9. These Orders appear in the Appendix.

At the conclusion of both the Government's and Defendants' cases, the trial judge granted a motion for judgment of acquittal as to the West Coast Supply Company on all counts of the Information and denied a similar motion as to the Petitioner [R. 311-17; 443-51].

The jury then found Petitioner guilty on each of the eight counts of the Information [R. 41,641].

The Court sentenced Petitioner to imprisonment for a period of three months in an institution of the jail type on each of the eight counts of the Information, the sentences on all counts to run concurrently and the execution of the jail sentence was suspended and the Petitioner placed on probation for sixty days on each of the eight counts, the term of probation to begin and run concurrently. The Petitioner was also fined the sum of $2,500.00 on each of the eight counts of the Information making a total fine of $20,000.00 [R. 44, 45].

Petitioner appealed to the Court of Appeals for the Ninth Circuit and the judgment of the District Court was affirmed on March 18, 1949. In affirming the judgment of the District Court, the Court of Appeals held that the evidence showed that the West Coast Supply Company was a partnership, the members of which were Petitioner and his father and brothers and that, consequently, the West Coast Supply Company's sugar ration bank accounts were accounts of the partnership's members—Petitioner and his father and brothers.

Petitioner thereupon filed a Petition for Rehearing in which he pointed out to the Court that the lower court had instructed the jury, as a matter of law, that the evidence was insufficient to prove that Petitioner was at any of the times mentioned in any of the counts of the Information, a partner of the West Coast Supply Company, and that the jury did accordingly so find. On June 9, 1949, the Court denied the Petition for Rehearing and amended its original opinion and, among other things, held that it was unimportant whether or not Petitioner was a partner of the West Coast Supply Company, the business under which Petitioner's father and brothers were doing business, and upon which account the checks, in question, were purportedly drawn.

Questions Involved.

1. May a Federal Court of Appeals sustain a judgment of conviction in a District Court on the ground that there was sufficient evidence to show that Petitioner was a member of a partnership despite the fact that the lower court withdrew and excluded from the jury the issue of whether or not Petitioner was a member of the partnership?

2. May a Federal Court of Appeals, after having rendered its opinion sustaining a judgment of conviction on the basis of evidence excluded from the consideration of the jury by the court below, amend its opinion upon having such fact called to its attention and sustain the judgment of conviction upon a different theory but upon the same excluded evidence?

3. May a Federal Court of Appeals disregard an instruction to a jury withdrawing certain evidence from its consideration and determine guilt on the basis of the record before the Court?

Reasons for Granting the Writ.

The discretionary power of this Court is invoked upon the following grounds:

1. Because the decision of the Court of Appeals for the Ninth Circuit sustaining the judgment of conviction on the basis of evidence in the record but withdrawn from the consideration of the jury, raises an important question in the administration of Federal criminal justice;

2. Because the decision of the Court of Appeals is in conflict with *Bollenbach v. United States*, 326 U. S. 607, 614, 90 L. Ed. 350, 355, and *Bihn v.*

United States, 328 U. S. 633, 638, 90 L. Ed. 1484, 1488, that guilt may not be spelt out of a record, but must be found by a jury according to the procedure and standards appropriate for criminal trials in the Federal Courts;

3. Because the Court of Appeals in sustaining a judgment of conviction on evidence which had been withdrawn and excluded from the jury, and then amending its opinion after having such fact called to its attention to sustain the judgment of conviction on a different theory but on that same excluded evidence, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision;

4. Because of the importance to the public of an authoritative determination by this Court that an appellate court may not usurp the function of a jury.

Wherefore, your Petitioner respectfully prays that this Petition be granted, and that a Writ of Certiorari be issued directed to the Court of Appeals for the Ninth Circuit.

CHARLES H. CARR,

Attorney for Petitioner.

Dated June 30, 1949.

IN THE

Supreme Court of the United States

October Term, 1948.

No.....

PAUL J. ZIEGLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

1. OPINIONS OF THE COURT BELOW.

The opinion of the Court of Appeals for the Ninth Circuit rendered on March 18, 1949, and as amended by Order of June 9, 1949, is unreported. The amended opinion appears in the Record at page 655 and the original appears in the Appendix to this Petition. The decision and proceedings in the District Court appear in the Transcript of Record herein [R. 1-652].

2. JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code Annotated. (Act of June 25, 1948, C. 646, 62 Stat. 869.) The matter to be reviewed arises under General Ration Order No. 8 (8 F. R. 3783) and Third Revised Ration Order No. 3

(11 F. R. 134) of the sugar rationing orders promulgated pursuant to the Second War Powers Act of 1942, 52 Stat. 177, *et seq.*, 50 U. S. C. A. App. Sec. 633, *et seq.* These orders are set forth in the Appendix.

3. STATEMENT OF CASE.

A full statement of the case appears in the Petition and for brevity it is not repeated here.

Specification of Error.

THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT AFFIRMING THE JUDGMENT OF CONVICTION, BASED UPON THE PREMISE BY THAT COURT THAT THE EVIDENCE SHOWED THAT PETITIONER AND HIS FATHER AND BROTHERS DID BUSINESS UNDER THE NAME WEST COAST SUPPLY COMPANY, IS ERRONEOUS IN THAT IT IS DIRECTLY CONTRARY TO THE RECORD AND IS AN INVASION BY THAT COURT OF THE PROVINCE AND FUNCTIONS OF THE JURY SINCE THE LOWER COURT HAD INSTRUCTED THE JURY, AS A MATTER OF LAW, THAT THE EVIDENCE ADDUCED AT THE TRIAL WAS INSUFFICIENT TO PROVE THAT PETITIONER WAS A PARTNER OF THE WEST COAST SUPPLY COMPANY.

A. The Court of Appeals for the Ninth Circuit erred in affirming the judgment of conviction on Counts ONE, THREE, FIVE and SEVEN because its decision is predicated upon the premise that Petitioner was a depositor, as defined by Third Revised Ration Order No. 3, Section 24.1(c) 9, since he was one of the partners of West Coast Supply Company, in which name and on which account the ration checks were purportedly drawn, when the record shows that the lower court instructed the jury,

as a matter of law, that there was insufficient evidence to prove that Petitioner was a member of the partnership.

B. The Court of Appeals for the Ninth Circuit erred in affirming the judgment of conviction on Counts Two, FOUR, SIX and EIGHT because its decision is predicated upon the premise that Petitioner was a partner of the West Coast Supply Company, and the receiving of the sugar by West Coast Supply Company was the receiving of a rationed commodity by Petitioner since he was a member of said partnership, when the record shows that the lower court instructed the jury, as a matter of law, that there was insufficient evidence to prove that Petitioner was a member of the partnership and that the jury should find that Petitioner was not a partner of the West Coast Supply Company.

C. It was error for the court below after having decided that the basic issue controlling the conviction of Petitioner was whether there was sufficient evidence showing that Petitioner was a partner of the West Coast Supply Company, to amend its opinion upon learning that the District Court had directed the jury by an instruction to find that Petitioner was not a partner of such company and sustain the judgment of conviction on a different theory but upon the same excluded evidence.

ARGUMENT.

Specification of Error.

The Decision of the Court of Appeals for the Ninth Circuit Affirming the Judgment of Conviction, Based Upon the Premise by That Court That the Evidence Showed That Petitioner and His Father and Brothers Did Business Under the Name West Coast Supply Company, Is Erroneous in That It Is Directly Contrary to the Record and Is an Invasion by That Court of the Province and Functions of the Jury Since the Lower Court Had Instructed the Jury, as a Matter of Law, That the Evidence Adduced at the Trial Was Insufficient to Prove That Petitioner Was a Partner of the West Coast Supply Company.

A. The Court of Appeals for the Ninth Circuit Erred in Affirming the Judgment of Conviction on Counts ONE, THREE, FIVE and SEVEN Because Its Decision Is Predicated Upon the Premise That Petitioner Was a Depositor, as Defined by Third Revised Ration Order No. 3, Section 24.1(c) 9, Since He Was One of the Partners of the West Coast Supply Company, in Which Name and on Which Account the Ration Checks Were Purportedly Drawn, When the Record Shows That the Lower Court Instructed the Jury, as a Matter of Law, That There Was Insufficient Evidence to Prove That Petitioner Was a Member of the Partnership.

One of the grounds of Petitioner's motion for judgment of acquittal in the District Court [R. 311-15] and which was renewed at the conclusion of the case [R. 443-45] was that the evidence was insufficient to prove that Petitioner was a depositor or had an account within the meaning of Third Revised Ration Order No. 3 and that, therefore, the purported checks were not checks within

the meaning of such ration order. Consequently, there was a failure of proof as to Counts ONE, THREE, FIVE and SEVEN.

Counts ONE, THREE, FIVE and SEVEN charged an offense under Section 15.7(d) of Third Revised Ration Order No. 3 which provides:

> "OVERDRAFTS PROHIBITED. No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account."

Under the foregoing section, in order to be an overdraft the check would have to be issued on the account of the depositor. Otherwise no offense would be stated under this section. Subparagraph (5) of paragraph (c) of Section 24.1 of the above mentioned Ration Order provides:

> " 'Check' means a sugar ration check in the form prescribed by the Office of Price Administration, drawn by a depositor against his account * * *"

and subparagraph (9) provides:

> " 'Depositor' means a person who has a ration bank account. * * *"

On appeal from the ruling of the lower court on the motion for judgment of acquittal, the Court of Appeals for the Ninth Circuit concluded there was substantial evidence that Petitioner was, in fact, a member of the partnership, West Coast Supply Company, in which name the ration account was carried. The Court stated on page 4 of its opinion filed March 18, 1949:

> "At all pertinent times, *appellant* and his father (John H. Ziegler) and brothers (Allen S. Ziegler

and Raymond M. Ziegler) were partners doing business in Los Angeles, California, under the name West Coast Supply Company." (Op. p. 4.) (Emphasis supplied.)

And again:

"These contentions are based on the false assumption that West Coast Supply Company and appellant were distinct entities. As indicated above, the evidence showed that West Coast Supply Company was a partnership the members of which were appellant and his father and brothers.[12]" (Op. p. 7.)

Also this Court, on page 7 of its opinion, in footnote 12, stated:

"Although he denied it, there was substantial evidence that appellant was, in fact, a member of the partnership."

The Court decided that Petitioner was a partner of the West Coast Supply Company and that because he was one of the partners of said partnership, the accounts of that company were his "accounts" and he was, therefore, a "depositor" and the checks drawn by him were "checks" within the meaning of the provisions of the Third Revised Ration Order No. 3 heretofore mentioned. In its amended opinion, the Court apparently reached the same conclusion as above, for its decision is based upon the premise that Petitioner and his father and brothers were doing business under the name West Coast Supply Company.

In concluding that there was substantial evidence that Petitioner was a member of the partnership of West Coast Supply Company, the Circuit Court completely overlooked the fact that the District Court had withdrawn and excluded from the jury the issue of whether or not Petitioner was a member of the partnership, West Coast Supply Company. In that connection, the lower court gave the following instruction:

> "You are instructed that the evidence adduced at the trial was insufficient to prove the defendant, Paul J. Ziegler, was at any of the times mentioned in any or all counts of the information a partner of the West Coast Supply Company. *You will accordingly find, therefore, that Paul J. Ziegler was not at any of the times mentioned in the information a partner of the said West Coast Supply Company.*" [R. 625.] (Emphasis supplied.)

The Court of Appeals for the Ninth Circuit both in its original and amended opinion apparently weighed the evidence on the record and determined that it was sufficient to prove that Petitioner was a member of the West Coast Supply Company, and it thus arrived at the conclusion that the partnership ration bank accounts were accounts of the partnership members. In so doing, the Court completely disregarded the fact that the jury had not passed on the issue of whether Petitioner was a member since the lower court had withdrawn it from the jury. If the Court of Appeals concluded that the evidence that Petitioner was a partner was sufficient to go to the jury, then there was only one alternative and that was for the

Court to reverse the case and send it back for a new trial thereby permitting a jury to pass upon the factual issue as to whether or not Petitioner was a member of the partnership. By doing otherwise, the Court invaded the province of the jury and endeavored to determine a question of fact which could be determined in a jury trial only by a jury.

On appeal from a denial of a motion to acquit for lack of evidence as to any material issue, the appellate court may review questions of law only and not questions of fact. As was pointed out by the Supreme Court in *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 254, 84 L. Ed. 1129, 1184:

> "His motion for a directed verdict at the conclusion of the case was denied by the trial court and the Circuit Court of Appeals held that there was no error in such denial. A question of law is thus raised, which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict."

And, as was said in *Securities and Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 88, 87 L. Ed. 626, 633:

> "But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury."

See, also:

Troxell v. Delaware, Lackawanna & Western R. R. Co., 227 U. S. 434, 444, 57 L. Ed. 586, 591;

Gunning v. Cooley, 281 U. S. 90, 94, 74 L. Ed. 720, 724.

An appeal from a denial of a motion to acquit permits the appellate court to consider whether there was evidence to sustain the verdict and not pass upon the weight of the evidence or to make findings of fact. If there is any issue of fact, it must be determined by the jury, and no issue of fact can be revised by the Court.

Hedderly v. U. S. (9 Cir.), 193 Fed. 561, 571;

O'Leary v. U. S. (9 Cir.), 160 F. 2d 333, 336;

24 C. J. S., p. 670, Sec. 1832; and

24 C. J. S., p. 785, Sec. 1880.

Whether there is a legal sufficiency of evidence in support of a material issue of the case which will warrant its submission to the jury is a question of law for the Court.

Marande v. Texas & Pacific Railway Co., 184 U. S. 173, 46 L. Ed. 487, 494.

B. The Court of Appeals for the Ninth Circuit Erred in Affirming the Judgment of Conviction on Counts TWO, FOUR, SIX and EIGHT Because Its Decision Is Predicated Upon the Premise That Petitioner Was a Partner of the West Coast Supply Company, and the Receiving of the Sugar by the West Coast Supply Company Was the Receiving of a Rationed Commodity by Petitioner Since He Was a Member of Said Partnership, When the Record Shows That the Lower Court Instructed the Jury, as a Matter of Law, That There Was Insufficient Evidence to Prove That Petitioner Was a Member of the Partnership and That the Jury Should Find That Petitioner Was Not a Partner of the West Coast Supply Company.

The Court of Appeals affirmed the judgment of convictions on Counts Two, Four, Six and Eight upon the theory that Petitioner received the rationed commodity sugar as charged in the Information since he was a partner of the West Coast Supply Company and the evidence showed that the sugar was actually received by that company. It is true that the record conclusively shows that the sugar was shipped to and received by the West Coast Supply Company. However, there was no evidence before the jury that Petitioner was one of the partners of the West Coast Supply Company since the District Court specifically directed the jury by an instruction to find that Petitioner was not a partner of that company [R. 625]. Therefore, the basic support of the Circuit Court's decision was wholly lacking, namely, that Petitioner was a partner and that because he was a partner of the West Coast Supply Company, the receipt by that company was "receipt" by him as charged in Counts Two, Four, Six and Eight of the Information. What has been heretofore said respecting the power of the Court of Appeals

to decide questions of fact which were not submitted to the jury by the trial court applies with like force and effect here.

One of the grounds of the motion for judgment of acquittal as to Counts Two, Four, Six and Eight [R. 311-16] and which was renewed at the conclusion of the case [R. 443-51] was that:

> "Respecting Ziegler, (Appellant) as to Counts Two, Four, Six and Eight, there is not one scintilla of evidence, your Honor, that Paul Ziegler ever received one pound of sugar. So I submit those counts I have just enumerated, the receiving counts, a motion as to them properly lies as to Paul Ziegler." [R. 316.]

There can be no question that the evidence contained in the record on this appeal shows that the sugar was received by the West Coast Supply Company. The Government introduced in evidence Exhibits 12 through 21, both inclusive, to establish that the sugar was actually delivered to the West Coast Supply Company. All exhibits introduced by the Government relating to delivery of the sugar show delivery to West Coast Supply Company [R. 257 *et seq.*].

The situation respecting Counts Two, Four, Six and Eight is identical with that of Counts One, Three, Five and Seven. Without proof that Petitioner was one of the partners of the West Coast Supply Company, there is no proof to support the verdict of the jury that he received the sugar as charged in Counts Two, Four, Six and Eight of the Information. The propositions of law and the authorities heretofore cited in connection with the argument relative to Counts One, Three, Five and Seven are equally applicable here.

C. It Was Error for the Court Below After Having Decided That the Basic Issue Controlling the Conviction of Petitioner Was Whether There Was Sufficient Evidence Showing That Petitioner Was a Partner of the West Coast Supply Company, to Amend Its Opinion Upon Learning That the District Court Had Directed the Jury by an Instruction to Find That Petitioner Was Not a Partner of Such Company and Sustain the Judgment of Conviction on a Different Theory but Upon the Same Excluded Evidence.

As noted, the Circuit Court in its original opinion rendered on March 18, 1949, sustained the judgment of conviction on the ground that there was sufficient evidence to show that Petitioner and his father and brothers were partners doing business in Los Angeles, California, under the name West Coast Supply Company, and that under that name Petitioner and his father and brothers had the three ration bank accounts carried by the Union Bank & Trust Company of Los Angeles. In answer to Petitioner's contention that he did not have an "account" as defined in subparagraph 1 of paragraph (c) of Section 24.1 of Third Revised Ration Order No. 3 and, hence, was not a "depositor" as defined in subparagraph 9 of paragraph (c), and that, therefore, the ration checks drawn by him were not "checks," as defined in subparagraph 5 of paragraph (c), the Court held that such contentions were based on "the false assumption that West Coast Supply Company and Petitioner were distinct entities."

Having decided in its opinion rendered on March 18, 1949, that the judgment of conviction should be sustained on the ground that there was sufficient evidence to prove that Petitioner was a partner of the West Coast Supply Company and that the partnership's ration bank accounts

were accounts of the partnership members, it was incumbent upon the Court to reverse the case and send it back for a new trial, thereby permitting a jury to pass upon the factual issue as to whether or not Petitioner was a member of the partnership. Clearly, in view of the fact that the lower court had instructed the jury, as a matter of law, that the evidence on the issue of whether Petitioner was a partner of the West Coast Supply Company was insufficient, and that the jury must find that Petitioner was not a partner of the West Coast Supply Company, any evidence in the record on that issue was not before the Court for consideration on the appeal from the denial of Petitioner's motion for judgment of acquittal.

The sole question for determination by the Court of Appeals for the Ninth Circuit was whether or not there was sufficient evidence to support the verdict of the jury. It is submitted that there was not, for the reason that there was no evidence before the jury to show that Petitioner was a partner of the West Coast Supply Company. The withdrawal of that issue from the jury, whether correct or incorrect, could not be remedied by that Court except by a return of the case for a re-trial and re-submission of the issue in question to a jury. An analogous situation was decided by the same Court in *Shaw v. U. S.* (9 Cir.), 131 F. 2d 476. As was pointed out by the Supreme Court in *Bollenbach v. U. S.*, 326 U. S. 607, 614, 90 L. Ed. 350, 355:

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, *but whether guilt has been found by a jury*

according to the procedure and standards appropriate for criminal trials in the federal courts." (Emphasis supplied.)

And again the Supreme Court reiterated in *Bihn v. U. S.*, 328 U. S. 633, 638, 90 L. Ed. 1484, 1488:

> "Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See Bollenbach v. United States, 326 U. S. 607, *ante*, 350, 66 S. Ct. 402."

Within the time permitted, Petitioner filed a Petition for Rehearing. In the Petition the Court's attention was called to the fact that the issue of whether Petitioner was a member of the partnership, West Coast Supply Company, had been withdrawn from the consideration of the jury by the instruction of the trial court. The Court of Appeals denied the Petition for Rehearing on June 9, 1949, and by amendment to its opinion of March 18, 1949, held that the evidence was sufficient to show that Petitioner and his father and brothers did business under the name West Coast Supply Company, and that whether they did so as partners or not was unimportant. The Court of Appeals really adhered to its earlier opinion, for the attempt to draw a distinction between Petitioner as a partner of the company and Petitioner doing business with his father and brothers under the name of the company cannot be supported upon any logical basis. Clearly, the Court of Appeals could not correct the error of its opinion of March 18th by seeking to sustain Petitioner's conviction on a different theory but on the same evidence appearing in the record, which was withdrawn by an instruction of the trial court from consideration by the jury.

Conclusion.

Wherefore, it is submitted that this case is one calling for the exercise of this Court of its supervisory powers, and that to such end a Writ of Certiorari should be granted to review the decision of the Court of Appeals for the Ninth Circuit and finally reverse it.

Respectfully submitted,

CHARLES H. CARR,

Counsel for Petitioner.

Dated June 30, 1949.

APPENDIX.

In the United States Court of Appeals for the Ninth Circuit.

Paul J. Ziegler, Appellant, vs. United States of America, Appellee.

No. 11,555.

Mar. 18, 1949.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before MATHEWS and STEPHENS, Circuit Judges, and DRIVER, District Judge.

MATHEWS, Circuit Judge.

On December 21, 1946, an information was filed against appellant (Paul J. Ziegler) and West Coast Supply Company. The information was based on paragraph (5) of subsection (a) of §2 of the Act of June 28, 1940, c. 440, as amended by §301 of the Second War Powers Act, 1942, 50 U. S. C. A. Appendix, §§633 and 1152;[1] §2.9 of General Ration Order No. 8, 8 F. R. 3783, issued under subsection (a) on March 25, 1943;[2] and paragraph (d) of §15.7 of Third Revised Ration Order No. 3, 11

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[1]Paragraph (5) provided: "Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

[2]Section 2.9 provided: "No person shall transfer or receive any rationed commodity in exchange for a ration document if he knows or has reason to believe that the ration document was not validly issued or that it was not acquired in accordance with a ration order by the person tendering it."

F. R. 134, issued under subsection (a) on December 29, 1945.[3]

The information was in eight counts. Count 1 alleged: "On or about July 1, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants, West Coast Supply Company, a partnership, and [appellant], willfully and unlawfully performed acts prohibited by section 15.7(d) of Third Revised Ration Order No. 3, in that said defendants did willfully and unlawfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks drawn on that account, by issuing and causing to be issued to the Union Sugar Company a sugar ration check drawn by and on behalf of the said West Coast Supply Company and [appellant] in the amount of six hundred thousand (600,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles, when the West Coast Supply Company had a balance in its accounts at said bank in an amount insufficient to cover the amount of said check."

Count 2 alleged: "From on or about July 3, 1946, to on or about August 17, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants, West Coast Supply Company, a partnership, and [appellant], willfully and unlawfully performed an act prohibited by section 2.9 of General Ration Order No. 8, in that said defendants did

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[3]Paragraph (d) provided: "No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account."

willfully and unlawfully receive a rationed commodity, three hundred and eighty thousand (380,000) pounds of sugar from the Union Sugar Company, in exchange for a ration document, to wit, a sugar ration check drawn by and on behalf of the said West Coast Supply Company and [appellant] in the amount of six hundred thousand (600,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles, dated July 1, 1946, and issued by the defendants,[4] when said defendants knew and had reason to believe that the said ration document was not validly issued because the said West Coast Supply Company did not have a sugar ration bank account in said bank with a balance therein sufficient to cover the amount of said check."

Counts 3, 5 and 7 were similar to count 1, except that count 3 related to a check issued to Spreckels Sugar Company for 30,000 pounds of sugar; count 5 related to a check issued to Holly Sugar Company for 660,000 pounds of sugar; and count 7 related to a check issued to C & H Sugar Company for 80,000 pounds of sugar.

Counts 4, 6 and 8 were similar to count 2, except that count 4 related to 30,000 pounds of sugar received from Spreckels Sugar Company on or about July 2, 1946, in exchange for the check mentioned in count 3; count 6 related to 660,000 pounds of sugar received from Holly Sugar Company from about July 1, 1946, to about August 30, 1946, in exchange for the check mentioned in count 5; and count 8 related to 80,000 pounds of sugar received from C & H Sugar Company on or about July 5, 1946, in exchange for the check mentioned in count 7.

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[4]The check mentioned in count 1.

Appellant was arraigned, pleaded not guilty to each count of the information, was tried, convicted and sentenced on each count and has appealed.

Thirteen alleged errors are specified. Specifications 1 and 2 are that the court erred in admitting evidence. Specification 5 is that the court erred in rejecting evidence. Specifications 1, 2 and 5 do not, as required by our Rule 20,[5] "quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found." Hence we are not required to consider specifications 1, 2 and 5.[6] However, we have considered them and find no merit in them.

Specification 3 is that the court erred in denying a motion made by appellant for a judgment of acquittal. The motion was on three grounds. Ground 1 was that the information did not state an offense. This ground is

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[5]Our Rule 20 provides:

"1. Counsel for the appellant shall file with the clerk of this court 20 copies of a printed brief * * *

"2. This brief shall contain * * *

"(d) In all cases save those of admiralty, a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial. * * *"

[6]Waggoner v. United States, 9 Cir., 113 F. 2d 867; Utley v. United States, 9 Cir., 115 F. 2d 117; Conway v. United States, 9 Cir., 142 F. 2d 202; Tudor v. United States, 9 Cir., 142 F. 2d 206; Roedel v. United States, 9 Cir., 145 F. 2d 819.

not urged here and hence need not be considered by us.[7] However, we have considered it and find no merit in it.

Ground 2 was that there was "a complete variance of the proof with the allegations of each and every count of the information." Ground 3 was that the evidence was "wholly insufficient to support a verdict of guilty on any of the eight counts of the information." In substance, grounds 2 and 3 were one ground, namely, that the evidence did not warrant appellant's conviction on any of the counts. There was evidence to the following effect:

At all pertinent times, appellant and his father (John H. Ziegler) and brothers (Allen S. Ziegler and Raymond M. Ziegler) were partners doing business in Los Angeles, California, under the name West Coast Supply Company. Under that name, appellant and his father and brothers had three sugar ration bank accounts, all of which were carried by Union Bank & Trust Company of Los Angeles, hereafter called Union Bank. To distinguish the three accounts from each other, one was called the West Coast Supply Company wholesale account, one was called the West Coast Supply Company processing account, and one was called the West Coast Supply Company industrial account. On July 1, 1946, the balances in these accounts were as follows: In the wholesale account, 43,196 pounds of sugar; in the processing account, 6,832 pounds of sugar; in the industrial account, 4,689 pounds of sugar.

On July 1, 1946, in Los Angeles, appellant issued four sugar ration checks, drawn by him on the West Coast

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[7]Waggoner v. United States, *supra;* Utley v. United States, *supra;* Cornes v. United States, 9 Cir., 119 F. 2d 127; Lane v. United States, 9 Cir., 142 F. 2d 249; Roedel v. United States, *supra.*

Supply Company wholesale account, as follows: To Union Sugar Company, check 144 (exhibit 6) for 600,000 pounds of sugar; to Spreckels Sugar Company, check 145 (exhibit 5) for 30,000 pounds of sugar; to Holly Sugar Company, check 146 (exhibit 4) for 660,000 pounds of sugar; to C & H Sugar Company, check 148 (exhibit 3) for 80,000 pounds of sugar. Check 144 was issued first and was outstanding when checks 145, 146 and 148 were issued. Each of the four checks was issued for an amount larger than the balance in the account on which it was drawn less the amount of outstanding checks drawn on that account. Appellant knew this when he issued the four checks mentioned above. Therefore he knew or had reason to believe that each of them was invalidly issued.

Between July 1, 1946, and August 30, 1946, in Los Angeles, appellant and his father and brothers received a rationed commodity, namely, sugar, in exchange for ration documents, namely, the four checks mentioned above,[8] as follows: From Union Sugar Company, 600,000 pounds of sugar in exchange for check 144; from Spreckels Sugar Company, 30,000 pounds of sugar in exchange for check 145; from Holly Sugar Corporation, sometimes called Holly Sugar Company, 660,000 pounds of sugar in exchange for check 146; from California & Hawaiian Sugar Refining Corporation, sometimes called C & H Sugar Company, 80,000 pounds of sugar in exchange for check 148.

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[8]Section 1.2 of General Ration Order No. 8 defined the term "ration document" as including a check.

Each of the four checks mentioned above was on a printed form the last two lines of which were as follows:

"..... (Print or type name of your account)

"....." (Authorized signature)

Appellant signed his name on the last line of each check. At that time, however, nothing was written, printed or typed on the preceding line. Appellant therefore contends that the checks were not "completed" and hence were not "issued," within the meaning of subparagraph (15) of paragraph (c) of §24.1 of Third Revised Ration Order No. 3.[9] We reject this contention for the following reasons:

The evidence showed that, after appellant had signed his name on the last line of each check, his attention was called to the fact that nothing had been written, printed or typed on the preceding line; that thereupon, with appellant's knowledge, consent and approval, the words "West Coast Supply Company" or "West Coast Supply Co." were printed or typed on the preceding line of each check;[10] and that the checks were thereafter delivered to the sugar companies to whose accounts they were made payable. Thus the checks were "completed" and "issued," within the meaning of subparagraph (15).

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[9]Subparagraph (15) provided: "'Issue' when used with respect to a check, means the delivery of a completed check to the person to whose account the check is made payable." Subparagraph (16) defined the term "person" as including a corporation.

[10]The words "West Coast Supply Company" were typed in checks 144 and 148. The words "West Coast Supply Co." were hand-printed in check 145 and typed in check 146.

It is true that the words "West Coast Supply Company" or "West Coast Supply Co." were not followed by the word "wholesale" or "processing" or "industrial" to indicate the account on which the checks were drawn. The evidence, however, showed that it had been and was agreed and understood by appellant and Union Bank that, in the absence of any such indication, ration checks drawn by appellant would be treated as having been drawn on the West Coast Supply Company wholesale account. The four ration checks mentioned above were so treated, and properly so, and were "completed" checks despite the omission of the word "wholesale." In view of the agreement just referred to, they would have been "completed" checks even if the words "West Coast Supply Company" or "West Coast Supply Co." had been omitted.

Appellant contends that he did not have an "account," as defined in subparagraph (1) of paragraph (c) of §24.1 of Third Revised Ration Order No. 3, and hence was not a "depositor," as defined in subparagraph (9) of paragraph (c), and that therefore the ration checks drawn by him were not "checks," as defined in subparagraph (5) of paragraph (c).[11] These contentions are based on the false assumption that West Coast Supply Company and appellant were distinct entities. As indicated above, the

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[11]Subparagraphs (1), (5) and (9) were as follows:

"(1) 'Account' means a sugar ration bank account carried by a bank in which the bank keeps a record of deposits of stamps, coupons, and checks and of transfers of sugar ration credits."

"(5) 'Check' means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person."

"(9) 'Depositor' means a person who has a ration bank account. * * *"

evidence showed that West Coast Supply Company was a partnership the members of which were appellant and his father and brothers.[12] This was a California partnership. Such a partnership is not an entity distinct from its members.[13] Hence the West Coast Supply Company sugar ration bank accounts mentioned above were accounts of the partnership's members—appellant and his father and brothers. These accounts, obviously, were "accounts," as defined in subparagraph (1). Hence appellant and his father and brothers were "depositors," as defined in subparagraph (9), and the ration checks drawn by appellant were "checks," as defined in subparagraph (5).

Appellant claims to have believed that General Ration Order No. 8 and Third Revised Ration Order No. 3 terminated on June 30, 1946, with the termination of the Emergency Price Control Act of 1942, 50 U. S. C. A. Appendix, §901 *et seq.*[14] There was no reason for any such belief. General Ration Order No. 8 and Third Revised Ration Order No. 3 were not issued under the Emergency Price Control Act of 1942, but were issued under subsection (a) of §2 of the Act of June 29, 1940, c. 440, as amended by §301 of the Second War Powers Act, 1942, 50 U. S. C. A., §§633 and 1152. Subsection (a) and the ration orders mentioned above did not termi-

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[12]Although he denied it, there was substantial evidence that appellant was, in fact, a member of the partnership.

[13]Jung v. Bowles, 9 Cir., 152 F. 2d 726.

[14]See subsection (b) of §1 of the Emergency Price Control Act of 1942, as amended by §1 of the Act of June 30, 1945, c. 214, 59 Stat. 306, and as amended by §1 of the Act of July 25, 1946, c. 671, 60 Stat. 664, 50 U. S. C. A. Appendix, §901. See, also, §18 of the last mentioned Act, 50 U. S. C. A. Appendix, §901a note.

nate on June 30, 1946, but remained in effect and were in effect on July 1, 1946, and at all pertinent times thereafter.[15] Appellant, a lawyer by profession, should have known this.

Appellant contends that Third Revised Ration Order No. 3 was invalid, citing Fleming v. Moberly Milk Products Co., App. D. C., 160 F. 2d 259. The Fleming case did not involve, much less hold invalid, the whole of Third Revised Ration Order No. 3. That order contained 165 sections. The Fleming case involved a part of one section, namely, §19.8. We are not here concerned with §19.8 or any part thereof. We are here concerned with paragraph (d) of §15.7. Paragraph (d) was not involved, considered or discussed in the Fleming case. We have not found, in the Fleming case or elsewhere, any reason to hold that paragraph (d) was invalid. We therefore hold that it was valid.

Appellant points out that check 145 was for an amount smaller than the balance in the account on which it was drawn. That, however, is immaterial; for, as indicated above, check 145, like each of the other checks issued by appellant on July 1, 1946, was for an amount larger than the balance in the account on which it was drawn less the amount of outstanding checks drawn on that account.[16]

We conclude that the evidence amply warranted appellant's conviction on each count of the information, and

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[15]See §1501 of the Second War Powers Act, 1942, as amended by §1 of the Act of June 29, 1946, c. 526, 60 Stat. 345, 50 U. S. C. A. Appendix, §645.

[16]See footnote 3.

that the motion for a judgment of acquittal was properly denied.

Specification 4 is that the court erred in permitting counsel for appellee (the United States) to call upon appellant, while appellant was on the witness stand, to produce his "private papers" (exhibits 40-44) and in compelling him to produce them.

Appellant took the witness stand voluntarily. On direct examination, he testified that he and his father were partners doing business under the name John H. Ziegler Company and, under that name, had a bank account; that on July 1, 1946, appellant purchased 600,000 pounds of sugar from Union Sugar Company, 30,000 pounds of sugar from Spreckels Sugar Company, 660,000 pounds of sugar from Holly Sugar Corporation[17] and 80,000 pounds of sugar from California & Hawaiian Sugar Refining Corporation;[18] that appellant signed the four ration checks mentioned above; that he paid for all the sugar purchased by him; and that "the last check given to pay for this sugar"[19] was dated July 12, 1946. Appellant thereupon produced this check and put it in evidence as exhibit F. This was check 2736, drawn by appellant on the John H. Ziegler Company bank account, for $36,838.20 payable to Union Sugar Company.

Appellant's cross-examination was, in part, as follows:

"Q. This cash check [2736] for $36,838.20, Defendant's Exhibit F, was the check in payment of the sugar

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[17]Appellant called this corporation Holly Sugar Company.

[18]Appellant called this corporation C & H Sugar Company.

[19]The quoted words indicated that this was one of several checks so given.

covered by the piece of paper [ration check 144], which is identified as Government's Exhibit 6 in evidence, is that right?

* * * * * * * * *

"The Witness: So as to be perfectly clear, this money check [2736], which is Defendant's Exhibit F, was given in payment for 6,000 bags, that is, 600,000 pounds, of sugar to the Union Sugar Company. This slip of paper [ration check 144], which is Government's Exhibit 6, was given to the Union Sugar Company in connection with the same 6,000 bags or 600,000 pounds of sugar for which the money check [2736] was given in payment.

"By Mr. Strong [appellee's counsel]: Thank you, sir. I don't see here any of the other checks used in payment for the transactions involving the 30,000 pounds of sugar which was sold by the Spreckels Sugar Company in connection with which the piece of paper [ration check 145] marked Government's Exhibit 5 was given, nor the check, money check, covering the other two transactions of 600,000 pounds and 80,000 pounds. I ask you whether the cash checks were in the same form as this Defendant's Exhibit F [money check 2736].

"A. If it would be of any help to you, Mr. Strong, the checks are here in court.

"Mr. Strong: May I see them?

"Mr. Carr [appellant's counsel]: Just a moment. I will decide that. I am counsel in the case.

"Mr. Strong: I am sorry. May I see them?

"Mr. Carr: No.

"Mr. Strong: I call upon the defendant [appellant] for the production of the three checks.

"Mr. Carr: Now I cite that as error to call upon the defendant upon the stand to produce any evidence in this case, and I ask your Honor to instruct the jury that he is not compelled to produce any evidence, except that which he desires to produce.

"The Court: In other words, on cross-examination?

"Mr. Carr: No, your Honor, he is not compelled to produce anything.

"The Court: Oh, yes. When a witness is on the stand, Mr. Carr, the Government is entitled to cross-examine him on any matters that pertain to the issue.

"Mr. Carr: Does your Honor order me to produce the checks?

"The Court: Yes.

"Mr. Carr: I will produce them, but I want it understood it is over my objection.

"The Court: That is right. Let the record so show.

"Mr. Carr: I might add to that, on the further ground[20] that it might tend to incriminate or bring other and collateral offenses into this case which are not charged in the information.

"The Court: That is personal privilege. I instruct the witness at this time, in view of the statement of counsel, that if you feel, Mr. Ziegler, that the production of these instruments might tend * * * to incriminate you, you have the right to refuse to answer and the court

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[20]Actually, this was not a "further" ground, but was the first and only ground stated.

will deny the request of the Government to produce the documents.[21]

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"Mr. Strong: May I have the checks, your Honor?

"The Court: Produce the checks."

Appellant thereupon produced the checks (exhibits 40-44). These were checks drawn by appellant on the John H. Ziegler Company bank account as follows: Check 2698 (exhibit 40), dated July 5, 1946, for $24,645.04 payable to Union Bank; check 2699 (exhibit 41), dated July 8, 1946, for $12,322.52 payable to Union Bank; check 2724 (exhibit 42), dated July 11, 1946, for $1,866.02 payable to Spreckels Sugar Company; check 2725 (exhibit 43), dated July 11, 1946, for $5,007.42 payable to California & Hawaiian Sugar Refining Corporation; check 2726 (exhibit 44), dated July 11, 1946, for $3,696.76 payable to Holly Sugar Corporation.

After producing checks 2698, 2699 and 2724-2726 (exhibits 40-44), appellant, on further cross-examination, testified that checks 2698 and 2699 (exhibits 40 and 41) were given to Union Bank for cashier's checks which, together with check 2726 (exhibit 44) were given to Holly Sugar Corporation in payment for the 660,000 pounds of sugar purchased from it; that ration check 146 (exhibit 4) was given to Holly Sugar Corporation in

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[21]To this statement of the court, there was no response by appellant or his counsel. As will presently appear, we disagree with that part of the statement which, in effect, told appellant that he need not produce the checks if he felt that they might tend to incriminate him. Appellant, however, was not prejudiced by and does not complain of that part of the statement.

connection with that purchase; that check 2724 (exhibit 42) was given to Spreckels Sugar Company in payment for the 30,000 pounds of sugar purchased from it; that ration check 145 (exhibit 5) was given to Spreckels Sugar Company in connection with that purchase; that check 2725 (exhibit 43) was given to California & Hawaiian Sugar Refining Corporation in payment for the 80,000 pounds of sugar purchased from it; and that ration check 148 (exhibit 3) was given to California & Hawaiian Sugar Refining Corporation in connection with that purchase. After appellant had so testified, checks 2698, 2699 and 2724-2726 (exhibits 40-44), hereafter called the checks, were admitted in evidence.[22]

Appellant contends that, in permitting appellee's counsel to call upon appellant to produce the checks and in requiring appellant to produce them, the trial court denied to appellant his constitutional privilege against self-incrimination.[23] We reject this contention for the following reasons:

Appellant voluntarily took the stand and testified as a witness for himself. He thus became subject to cross-examination like any other witness and, to that extent, waived his privilege against self-incrimination.[24] On di-

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[22]Although objected to at the trial, the admission of the checks in evidence is not specified as error.

[23]See U. S. C. A. Const. Amend. 5.

[24]Fitzpatrick v. United States, 178 U. S. 304; Powers v. United States, 223 U. S. 303; Raffel v. United States, 271 U. S. 494; Johnson v. United States, 318 U. S. 189; Cravens v. United States, 8 Cir., 62 F. 2d 261; United States v. Dalhover, 7 Cir., 96 F. 2d 355; United States v. Buckner, 2 Cir., 108 F. 2d 921; United States v. Harrison, 3 Cir., 121 F. 2d 930; Banning v. United States, 6 Cir., 130 F. 2d 330; Viereck v. United States, App. D. C., 139 F. 2d 847; Claunch v. United States, 5 Cir., 155 U. S. 261.

rect examination, appellant testified that he paid for the sugar purchased from Spreckels Sugar Company, Holly Sugar Corporation and California & Hawaiian Sugar Refining Corporation and indicated that he did so by giving checks. On cross-examination, appellant informed appellee's counsel that the checks so given (exhibits 40-44) were "in court." Appellee's counsel then called upon appellant to produce the checks, the court directed appellant to produce them, and appellant did so. Thus the production of the checks was a part—and, we think, a proper part—of appellant's cross-examination.[25]

Appellant did not, when called upon by appellee's counsel to produce the checks or when directed by the court to produce them, claim his privilege against self-incrimination. Hence, if appellant had not theretofore waived that privilege, he waived it then by failing to claim it.[26]

It is true that appellant's counsel objected to the production of the checks, but that objection cannot be regarded as a claim of appellant's privilege against self-incrimination, for appellant's privilege was personal to him and

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[25]United States v. Buckner, *supra.*

[26]United States *ex rel.* Vajtauer v. Commissioner, 273 U. S. 103; United States v. Murdock, 284 U. S. 141; Kolbrenner v. United States, 5 Cir., 11 F. 2d 754; Cravens v. United States, *supra;* Nicola v. United States, 3 Cir., 72 F. 2d 780; Claiborne v. United States, 8 Cir., 77 F. 2d 682; United States v. Dalhover, *supra;* Edwards v. United States, 10 Cir., 131 F. 2d 198.

could not be claimed by someone else for him,[27] not even by his counsel.[28]

In McKnight v. United States, 6 Cir., 115 F. 972, and Hilliard v. United States, 4 Cir., 121 F. 2d 992, cited by appellant, the defendants (McKnight and Hilliard) were called upon by Government counsel to produce documents when the defendants were not and had not been on the witness stand and, of course, were not being cross-examined. The privilege against self-incrimination was not waived by McKnight or by Hilliard. In Harrold v. Territory, 8 Cir., 169 F. 2d 47, and Tucker v. United States, 8 Cir., 5 F. 2d 818, cited by appellant, the defendants (Harrold and Tucker) were required by the trial court, on cross-examination, to answer questions concerning matters which were wholly unrelated to their testimony on direct examination. As to those matters, the privilege against self-incrimination was not waived by Harrold or by Tucker. Obviously, the McKnight, Hilliard, Harrold and Tucker cases are not in point here.

We conclude that there is no merit in specification 4.

Specification 6 is that the court erred in giving the jury appellee's requested instruction 8. Specifications

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[27]Hale v. Henkel, 201 U. S. 43; McAlister v. Henkel, 201 U. S. 90; Morgan v. Haberstadt, 2 Cir., 60 F. 592; London v. Everett H. Dunbar Corp., 1 Cir., 179 F. 506; Claiborne v. United States, *supra;* United States v. Ginsburg, 7 Cir., 96 F. 2d 882; *In re* Knickerbocker Steamboat Co., D. C. S. D. N. Y., 136 F. 956; United States v. Johnson, D. C. M. D. Pa., 76 F. Supp. 538.

[28]London v. Everett H. Dunbar Corp., *supra; In re* Knickerbocker Steamboat Co., *supra;* United States v. Johnson, *supra.*

7-13 are that the court erred in failing to give the jury appellant's requested instructions 16, 22, 26, 35-37 and 39. Thus, in specification 6, appellant assigns as error a portion of the court's charge to the jury. In specifications 7-13, he assigns as error omissions from the charge. Rule 30 of the Federal Rules of Criminal Procedure provides:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

In this case, each party filed a request for instructions to the jury. A copy of each request was furnished to the adverse party. Appellant's request set forth 40 requested instructions. Appellee's request set forth 12 requested instructions. Prior to the arguments to the jury, appellant objected to appellee's requested instruc-

tion 8, mentioned in specification 6, and appellee objected to appellant's requested instructions 16, 22, 26, 35-37 and 39, mentioned in specifications 7-13. Appellant's objection to appellee's requested instruction 8 cannot be regarded as an objection to any portion of the charge, for appellant's objection to appellee's instruction 8 was made before the charge was given. Until the charge was given, appellee's requested instruction 8 was not a portion of it.

Prior to the arguments to the jury, the court informed the parties and their counsel of its proposed action upon the requests, namely, that it proposed to include in the charge appellee's requested instruction 8 and omit therefrom appellant's requested instructions 16, 22, 26, 35-37 and 39. When so informed of the court's proposed action upon the requests, appellant made no objection whatever. He could not at that time object to any portion of the charge or omission therefrom, for the charge had not been given.

The court, at the time it informed the parties and their counsel of its proposed action upon the requests, stated that exceptions[29] were "allowed" to appellant. Appellant, however, took no exception and made no objection. The court's statement cannot be regarded as an objection by appellant to any portion of the charge or omission therefrom, first, because it was not an objection, second, be-

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[29]See Rule 51 of the Federal Rules of Criminal Procedure.

cause it was not made by appellant and, third, because it was made before the charge was given. Until the charge was given, there could be no objection to any portion thereof or omission therefrom.

The charge was given, as required by Rule 30, after the arguments to the jury were completed. Appellee's requested instruction 8 was included in the charge, and appellant's requested instructions 16, 22, 26, 35-37 and 39 were omitted therefrom. Appellant did not object to any portion of the charge or omission therefrom before the jury retired to consider its verdict. Hence we are not required to consider specifications 6-13.[30]

Specifications 6-13 do not, as required by our Rule 20,[31] "set out the part referred to *totidem verbis,* whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial." For this reason, as well as for the reasons stated above, we are not required to consider specifications 6-13.[32] However, we have considered them and find no merit in them.

Judgment affirmed.

(Endorsed:) Opinion. Filed Mar. 18, 1949. Paul P. O'Brien, Clerk.

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[30]Shockley v. United States, 9 Cir., 166 F. 2d 704. See, also, United States v. Sutter, 7 Cir., 160 F. 2d 754; Watts v. United States, 5 Cir., 161 F. 2d 511; Thayer v. United States, 10 Cir., 168 F. 2d 247.

[31]See footnote 5.

[32]Conway v. United States, *supra.*

Second War Powers Act.

50 U. S. C. A. App. Sec. 633 (2).

"Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * * * * * *

"(5) Any person who willfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

THIRD REVISED RATION ORDER NO. 3.

"Sec. 15.7. *Issuance and use of checks*—(a) *When check to be issued.* A check may be issued only by a depositor and only for a purpose permitted and with the effect prescribed by Revised General Ration Order 5 or this order authorizing the account on which the check is drawn, except as otherwise provided in section 15.8 (d) of this order.

"(b) *How checks are issued.* Each check and its stub must be completely filled out before the check may be issued, but a check register, duplicate voucher or any

similar record may be used in place of the check stub. Both check and stub or other record must contain the name of the person to whom the check is to be issued, the date on which it is drawn and the amount of credits to be transferred. The check must bear the name of the account and the depositor's authorized signature or signatures.

"(c) *Post-dated checks prohibited.* No person may issue or transfer a check before the date it bears.

"(d) *Overdrafts prohibited.* No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account.

"(e) *What checks to be certified.* Only checks which are surrendered to the Office of Price Administration by primary distributors when they file their periodic reports are to be certified or confirmed.

"(f) *Altered or mutilated checks.* (1) No check which has been altered (except as authorized in subparagraph (2) of this paragraph), mutilated or partially destroyed, or which contains an erasure, may be issued, transferred or deposited. A person who holds such a check shall return it to the issuer with a request for a new check. If he is unable to locate the issuer, or to obtain a new check from him, he shall deliver the check to the District Office, with a statement of all the circumstances.

"(2) Checks and their stubs may be altered only by banks before delivering them to depositors and by issuers before or at the time of issuing them, and only to the extent of changing the name of the commodity (for

example, from processed foods to sugar) and where necessary, the unit designation (for example, from points to pounds); and checks so altered may be issued, transferred and deposited.

"(g) *Lost checks.* A person who loses or unintentionally destroys a check issued or transferred to him, or from whom such a check is stolen, shall notify the issuer in writing of the circumstances of the loss or destruction and request that a new check be issued to him. If he is unable to locate the issuer, or to obtain a new check from him, he shall send the district office a statement signed by him of all the circumstances.

"(h) *How altered and lost checks replaced.* A depositor to whom an altered (except as authorized in subparagraph (2) of paragraph (f) of this section), mutilated or partially destroyed check issued by him is returned or who receives a request for the replacement of a lost, destroyed, or stolen check issued by him, may issue a new check. If he does so, he must enter on the stub or other record used in place of the stub or other record used in place of the stub of the original check the fact that it has been lost, stolen, altered, mutilated, partially or completely destroyed, and on the stub or other record of the new check the fact that it replaces the original check. Every depositor shall immediately send his bank a written description of any checks drawn on his account and lost or stolen before deposit, and a description of any checks issued to replace them.

"(i) *Non-depositors may transfer checks.* A person who is not a depositor and is not required to be one, to whom a check is properly issued or transferred, may transfer it to any person for any purpose for which other

evidences may be transferred under Revised General Ration Order 5 or this order authorizing the account on which the check is drawn. He must endorse the check before transferring it.

* * * * * * * * *

ARTICLE XXIV—DEFINITIONS.

"Sec. 24.1. *Meaning of terms used in this order.* (a) Whenever the provisions of this order impose or confer duties, obligations, rights or privileges upon an establishment or registering unit, such duties, obligations, rights and privileges shall be considered as being conferred or imposed upon the person owning such establishment or registering unit with respect thereto. Whenever reference is made to an act done or to be done, or to property owned, by an establishment or a registering unit, it shall be deemed to refer to an act done or to be done, or to property owned, by the person owning such establishment or unit in its behalf.

"(b) Words importing the masculine gender include the feminine and neuter genders; and words importing the singular include the plural and vice versa."

"(c) Definitions:

"(1) 'Account' means a sugar ration bank account carried by a bank, in which the bank keeps a record of deposits of stamps, coupons, and checks and of transfers of sugar ration credits.

* * * * * * * * *

"(5) 'Check' means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn

by a depositor against his account and made payable to the account of a named person.

* * * * * * * * *

"(8) 'Delivery' means the transfer of physical possession or the transfer of a document of title.

"(9) 'Depositor' means a person who has a ration bank account. A person shall be deemed a separate depositor with respect to each of his accounts.

* * * * * * * * *

"(13) 'Industrial user' means any 'person' who has an 'industrial user establishment.' 'Industrial user establishment' means any establishment where a person uses sugar in producing, manufacturing, or processing any product other than sugar if the product is not to be used in the preparation or service of food or beverages which the establishment or its owner serves to consumers. It also includes any establishment (except an establishment at which sugar is used only for educational purposes under the direction of the Department of Agriculture or the Extension Service of the Department of Agriculture) at which sugar is used for experimental, education, testing, or demonstration purposes, whether or not a product resulting from such uses is to be used in the preparation or service of foods or beverages which the establishment or its owner serves to consumers. An industrial user who ceases (other than temporarily) to make an industrial use of sugar is not regarded as an industrial user after he ceases.

* * * * * * * * *

"(15) 'Issue' when used with respect to a check, means the delivery of a completed check to the person to whose account the check is made payable.

* * * * * * * * *

"(18) 'Ration credits' means the credits in an account reflecting deposits of stamps, coupons or checks.

"(19) 'Ration evidence' or 'evidences' means checks, coupons, and stamps."

GENERAL RATION ORDER No. 8.

"Sec. 2.9. *Transfer in exchange for invalid or improperly acquired ration document.* No person shall transfer or receive any rationed commodity in exchange for a ration document if he knows or has reason to believe that the ration document was not validly issued or that it was not acquired in accordance with a ration order by the person tendering it."

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 167

PAUL J. ZIEGLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 655-676) is reported at 174 F. 2d 439.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1949 (R. 677), and a petition for rehearing was denied on June 9, 1949 (R. 678). The petition for a writ of certiorari was filed on July 6, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the affirmance of petitioner's conviction was based upon a theory which was excluded in the trial court and, therefore, not passed upon by the jury.

REGULATIONS INVOLVED

General Ration Order No. 8, as amended, of the Office of Price Administration provided in pertinent part as follows:

> Sec. 2.9 *Transfer in exchange for invalid or improperly acquired ration document.* No person shall transfer or receive any rationed commodity in exchange for a ration document if he knows or has reason to believe that the ration document was not validly issued or that it was not acquired in accordance with a ration order by the person tendering it. [8 F.R. 3784.]

Third Revised Ration Order No. 3, as amended, of the Office of Price Administration, provided in pertinent part as follows:

> Sec. 15.7 *Issuance and use of checks*— * * *
>
> * * *
>
> (d) *Overdrafts prohibited.* No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account. [11 F.R. 153.]
>
> * * *
>
> Sec. 24.1 *Meaning of terms used in this order.* * * *
>
> * * *
>
> (c) Definitions:
>
> (1) "Account" means a sugar ration bank account carried by a bank, in which the bank keeps a record of deposits of stamps, coupons,

and checks and of transfers of sugar ration credits.

* * *

(5) "Check" means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person.

* * *

(9) "Depositor" means a person who has a ration bank account. A person shall be deemed a separate depositor with respect to each of his accounts. [11 F.R. 164.]

STATEMENT

An eight-count information was filed against petitioner and the West Coast Supply Company in the United States District Court for the Southern District of California, charging violations of O.P.A. sugar rationing regulations. Four counts alleged the issuance, in violation of Section 15.7(d) of Third Revised Ration Order No. 3, *supra,* p. 2, of a sugar ration check for an amount larger than the balance in the account on which the check was drawn less the amount of outstanding checks drawn on that account. The other four counts charged the receipt, in violation of Section 2.9 of General Ration Order No. 8, *supra,* p 2, of specified quantities of sugar in exchange for the ration documents which had been unlawfully issued. (R. 2-8.)

The evidence may be summarized as follows:

Petitioner, a lawyer (R. 333) and a former O.P.A. ration board member (R. 122), together with his father and two brothers, operated a business in Los Angeles in which they manufactured and distributed bakery supplies under the name West Coast Supply Company (R. 333-335). The concern had three sugar ration accounts in the Union Bank and Trust Company of Los Angeles, denominated the wholesale account, the industrial account, and the processing account (R. 64), and petitioner was authorized to draw sugar ration checks on the accounts (R. 66-67).

In February 1944, petitioner and his father formed the John H. Ziegler Company, a partnership, which apparently took over the manufacturing operations of the West Coast Supply Company (R. 335), with the latter purchasing and distributing the manufactured products of the John H. Ziegler Company (R. 344), consisting of jams, extracts, and other commercial bakery products (R. 333). In July 1946, the daily sugar requirements in the manufacture of those products were about 47,500 pounds per day (R. 336). The John H. Ziegler Company, nevertheless, never had an official sugar quota (R. 336, 362, 406).

Despite the separation of functions between the two companies, they were closely inter-related. They operated adjoining, physically connected buildings (R. 255, 337). Petitioner continued to serve the West Coast Supply Company, devoting

himself, as before, to matters involving O.P.A. and other governmental regulations affecting the company (R. 335, 361; see also R. 73-74). Prior to July 1, 1946, petitioner purchased some sugar for the John H. Ziegler Company with ration checks drawn on the "ration point account" of the West Coast Supply Company (R. 362-366). Moreover, petitioner was listed as a partner in the latter firm in its registration with the Food and Drug Section, California Department of Public Health, and he stated to a representative of that agency that he was an "owner-partner" in the company (R. 145, 147). Likewise, although petitioner stated that the applications were made for the benefit of the John H. Ziegler Company, he described himself as a partner in the West Coast Supply Company in applications for increased sugar allotments made in the name of the latter firm prior to July 1, 1946 (R. 244-245, 372-378, 401-409). As late as August 1946, petitioner's brothers, one of whom was managing partner of the West Coast Supply Company (R. 265), referred to petitioner as the firm's manager (R. 272, 286; see also R. 284).

On July 1, 1946, petitioner placed orders for sugar, aggregating 1,370,000 pounds, with four different sugar companies through their respective brokers, Mailliard & Schmiedell, Sims-Thompson Company, Parrott & Company, and Kelley-Clarke Company (R. 125-126, 193, 165-166, 220-227, 349-350). When petitioner placed the first of the orders, that with Mailliard & Schmiedell (R. 349, 125-

126), he indicated that he thought sugar rationing was ended (R. 157), but Mr. Leland, representing that firm, informed petitioner that he (Leland) had different information and insisted on a ration check to cover the order (R. 128, 157). Accordingly, petitioner not only furnished a ration check to Mr. Leland, but also to each of the other brokerage firms with which orders had been placed (R. 130-132, 167-169, 197, 226). The last two lines of the forms on which the checks were written were as follows (R. 661-662):

.....
(Print or type name of your account)
.....
(Authorized signature)

When the checks were received by the Union Bank and Trust Company for posting, the words "West Coast Supply Company" or "West Coast Supply Co." were on the account line (R. 70-71, 84-85, 340-342).

At the trial, petitioner asserted that, although he signed the checks, they did not bear the name of the West Coast Supply Company when they were issued, and he in effect denied that he had authorized the addition of the name of that company when representatives of the brokerage firms questioned him relative to the account line on the checks being blank (R. 340-344). A representative of the Sims-Thompson Company testified, however, that, when the check sent to that company was received,

the check bore the name of the West Coast Supply Company as the account to be charged (R. 215). Similarly, a representative of Parrott & Company testified that petitioner had specifically authorized the addition of the name of the West Coast Supply Company on the penultimate line of the check form (R. 172-173). While there is no evidence as to who completed that line on the checks received by Mailliard & Schmiedell (R. 132) and the Kelley-Clarke Company (see R. 220-223), petitioner made no objection when a representative of the Union Bank and Trust Company informed petitioner that the check sent to the Mailliard firm had been reported to the O.P.A. as resulting in a large overdraft in the account of the West Coast Supply Company (R. 75-77). Moreover, petitioner specifically instructed the representative of the bank to "post it [the check sent to Parrott & Company] and show it as an overdraft and report it to the Office of Price Administration" (R. 78).

All of the ration checks furnished by petitioner were charged to the wholesale account of the West Coast Supply Company (R. 70).[1] The total of the highest balances on all of the accounts of that company following the issuance of the checks, without deducting them, was only 34,717 pounds (R. 79-80), and the final overdraft on the accounts after

[1] The checks did not specify the particular account to be charged (R. 662). However, petitioner had previously instructed the Union Bank and Trust Company that any check on which the account to be debited was not designated was to be charged to the wholesale account (R. 111).

the checks were posted was 1,351,804 pounds (R. 120). The West Coast Supply Company did not object to the checks being charged against its accounts (R. 100-101).

The sugar which was ordered by petitioner was addressed and billed to, and received on behalf of, the West Coast Supply Company (R. 133-135, 148-149, 159-162, 201-202, 255-262, 391). Part of the sugar, however, was delivered directly to an employee of the John H. Ziegler Company at its warehouse (R. 255). Petitioner paid for the sugar with checks drawn on the account of the John H. Ziegler Company (R. 355-356, 385-387, 395-399).

A motion for a judgment of acquittal was granted as to the West Coast Supply Company (R. 443), but a similar motion by petitioner was denied (R. 443-451), and he was convicted on all counts (R. 41, 641). He was sentenced to three months' imprisonment and fined $2,500 on each count, the imprisonment sentences to run concurrently. The execution of the jail sentences was suspended. (R. 44-45.) The judgment of conviction was affirmed (R. 677).

ARGUMENT

Petitioner's sole contention is that the Court of Appeals erroneously affirmed the judgment of conviction on the basis of evidence which tended to show that he was a partner in the West Coast Supply Company, although that issue had been excluded from the jury's consideration by the trial

court's instruction that the evidence was insufficient to prove that he was a partner in the company (R. 625). He argues in effect, therefore, that the Court of Appeals invaded the province of the jury, contrary to the decisions of this Court in *Bollenbach* v. *United States,* 326 U. S. 607, and *Bihn* v. *United States,* 328 U. S. 633. (Pet. 10-20.)

This contention is without merit. The court below ruled (R. 664) that "The evidence * * * clearly showed that [petitioner] and his father and brothers did business under the name West Coast Supply Company" and "Whether they did so as partners or not is unimportant."

This was not a novel theory of the case announced, for the first time, by the appellate court. In the course of the Government's summation, a virtually identical statement was made: "The issue of his partnership or whether he is a partner has nothing to do with the present status of the case" (R. 597).

Petitioner's relationship with the West Coast Supply Company is said to be germane, first, to whether the accounts of the Company were sufficiently petitioner's accounts as to make him a "depositor" and the checks he wrote "checks" within the meaning of the ration order (Pet. 12); and second, whether receipt of sugar by the Company was receipt by the petitioner (Pet. 16). But the trial court did not exclude any evidence of the relationship between petitioner and the West Coast Supply Company for consideration by

the jury, except in so far as the evidence tended to prove that he was actually a partner in the concern (see R. 441). Moreover, the trial judge correctly instructed the jury as to the meaning of the word "check" as that term is defined in Section 24.1 (c)(5) of Third Revised Ration Order No. 3 (R. 624), and petitioner's counsel, in his final argument to the jury, pointed out the meaning of all other pertinent words in the regulations involved (R. 567-572).

Petitioner stated at the trial that he had the right to have the industrial account of the West Coast Supply Company transferred to the John H. Ziegler Company when the latter company was formed and that the transfer was not made because of the difficulty he would have had in purchasing sugar for a new concern (R. 404, 407-408). Prior to July 1, 1946, on which day the offenses of which he was convicted were committed, petitioner admittedly purchased sugar for the John H. Ziegler Company with ration checks made out in the name of the West Coast Supply Company, and he applied for increased sugar allotments in the name of the latter company for the benefit of the former company. Since petitioner's father and brother did not object to petitioner's drafts upon the West Coast Supply Company's account, the jury was justified in inferring that petitioner was actually a depositor, even though the account was carried in the name of the West Coast Supply Company. The

sugar was shipped to the latter company and paid for by petitioner. The fact of payment, plus the delivery of part of the sugar to the John H. Ziegler Company, indicates that petitioner was the beneficiary of the scheme.

Certainly, nothing in the charge of the trial court denied to the jury the right to decide that petitioner was authorized to, and did, deal with the account of the Company as his own.

CONCLUSION

The decision of the court below is correct. Involving, as it does, the peculiar facts in this record, there is, and can be, no conflict of decisions. And there is no other ground for the intervention of this Court. Consequently, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 948869